PLC Credit & Factoring Sdn Bhd v Daichi Holding Bhd

HIGH COURT (SHAH ALAM) — COMPANIES WINDING-UP NO BA-28NCC-142–03 OF 2018
VAZEER ALAM J
7 NOVEMBER 2018

Companies and Corporations — Winding up — Petition — Petitioner obtained judgment against respondent based on hire purchase agreement and guarantee and indemnity — Respondent indebted to petitioner based on judgment — Respondent failed to make payment — Petitioner filed petition pursuant to s 465(1)(e) of the Companies Act 2016 — Whether petitioner entitled to present winding up petition based on judgment — Whether there was fraud or collusion — Whether sum stipulated in judgment erroneous — Whether petitioner entitled to claim outstanding sum even when petitioner did not retake possession of hired goods — Whether respondent unable to pay its debts — Whether it was just an equitable for respondent to be wound up — Companies Act 2016 s 465(1)(e)

The respondent owed the petitioner a sum of RM1,648,376.96 ('the said sum'), being the outstanding sum due and owing under a judgment obtained by the petitioner against the respondent. The petitioner had issued a statutory notice of demand ('the said notice') under s 465(1)(e) of the Companies Act 2016 ('the Act') requiring the respondent to pay the said sum within 21 days from receipt of the said notice. The respondent failed to make payment which led to the filing of this petition by the petitioner under s 465(1)(e) of the Act. In opposing the petition, the respondent argued that the said amount stated in the notice was erroneous. The respondent stated that the judgment on which the petitioner grounded the said notice arose from a hire purchase agreement between the petitioner and Breast Wellness (M) Sdn Bhd ('the hirer') and a guarantee and indemnity between the petitioner and the respondent, wherein the respondent guaranteed due performance for the hire purchase agreement by the hirer. The respondent submitted that the calculation of the said sum did not correspond to the terms of the hire purchase agreement and the guarantee and indemnity. In addition, the respondent contended that the re-taking of the goods which was the subject matter of the hire purchase was a pre-requisite to a claim against the respondent, and thus argued that the amount claimed as debt due and owing in the said notice was wrong. The petitioner submitted that the respondent had raised similar arguments in the High Court at the first instance where the judgment was obtained. The High Court had rejected the arguments and on appeal, the Court of Appeal had affirmed the High Court's decision.

Held, granting order in terms of prayers 10(a), (b) and (c) with costs of RM5,000:

(1) The judgment dated 11 April 2017 was a valid and subsisting judgment, which had not been set aside or stayed. Hence, the petitioner was perfectly entitled to present a winding up petition based on this judgment. There was no evidence showing that the judgment was obtained by fraud or collusion. In the absence of such vitiating circumstances or evidence, it was not for the winding up court to question the validity of the judgment, or question the sum stated therein as due and owing to the judgment creditor ie the petitioner. In addition, the matters raised by the respondent in opposing the petition had been considered by both the High Court and Court of Appeal in sealing the judgment for the petitioner (see para 9).

(2) There was no substance to the respondent's contention that the sum due and payable by the respondent under the judgment was erroneous. In fact, the petitioner's certificate of indebtedness showed the calculation of the outstanding judgment debt and the total outstanding was RM1,648,376.96. That sum of RM1,648,376.96 was the amount that was stipulated in the said notice and also the petition. The court therefore satisfied that the outstanding sum due and owing by the respondent to the petitioner had been proper and accurately calculated as per the terms of the judgment (see para 10).

(3) The court could not accept the respondent's argument that the petitioner must retake the possession of the hired goods and have them sold and deduct the proceeds of the sale thereof from the outstanding sum before making any claims against the respondent. Firstly, the said judgment did not stipulate that the petitioner must do so. Secondly, the petitioner was entitled to claim the outstanding sum due and payable by the respondent under the hire purchase agreement which was then merged into the said judgment, even when the petitioner did not retake possession of the hired goods (see para 11).

(4) On totality of the evidence and arguments, the court found the petitioner had made out a strong case for the respondent's winding up under s 465(1)(e) of the Act, as the respondent was clearly unable to pay its debts, and thus it was just and equitable that the respondent be wound up (see para 12).

[Bahasa Malaysia summary

Responden telah berhutang dengan pempetisyen sebanyak RM1,648,376.96 ('jumlah tersebut'), yang merupakan amaun tertunggak dan terhutang di bawah satu penghakiman yang diperoleh oleh pempetisyen terhadap responden. Pempetisyen telah mengeluarkan notis tuntutan statutori ('notis tersebut') di bawah s 465(1)(e) Akta Syarikat 2016 ('Akta') yang

A mengkehendaki responden untuk membayar jumlah tersebut dalam tempoh 21 hari dari penerimaan notis tersebut. Responden gagal membuat pembayaran yang membawa kepada pemfailan petisyen ini oleh pempetisyen di bawah s 465(1)(e) Akta. Menentang petisyen itu, responden berpendapat bahawa jumlah yang dinyatakan dalam notis tersebut adalah salah. Responden B menyatakan bahawa penghakiman yang pempetisyen mendasarkan notis tersebut timbul daripada perjanjian sewa beli antara pempetisyen dan Breast Wellness (M) Sdn Bhd ('penyewa') dan jaminan dan indemniti antara pempetisyen dan responden, di mana responden menjamin prestasi pelaksanaan perjanjian sewa beli oleh penyewa. Responden mengemukakan C bahawa pengiraan jumlah tersebut tidak sama dengan terma perjanjian sewa beli dan jaminan dan indemniti. Di samping itu, responden menegaskan bahawa pengambilan semula barang yang merupakan perkara subjek sewa beli adalah prasyarat untuk tuntutan terhadap responden, dan dengan itu berhujah bahawa amaun yang dituntut sebagai hutang tertunggak dan hutang dalam D notis adalah salah. Pempetisyen mengemukakan bahawa responden telah membangkitkan hujah-hujah yang sama di Mahkamah Tinggi dari mula lagi di mana penghakiman itu diperolehi. Mahkamah Tinggi telah menolak hujahan dan atas rayuan, Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi.

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Diputuskan, memberikan perintah mengikut terma permohonan 10(a), (b) dan (c) dengan kos RM5,000:

(1) Penghakiman bertarikh 11 April 2017 adalah sah dan penghakiman yang F wujud, yang masih belum diketepikan atau digantung. Oleh itu, pempetisyen berhak untuk mengemukakan petisyen penggulungan berdasarkan penghakiman ini. Tiada keterangan menunjukkan bahawa penghakiman itu diperolehi dengan penipuan atau kesepakatan sulit. Dengan ketiadaan apa-apa keadaan atau keterangan, ia bukanlah untuk G Mahkamah penggulungan untuk mempersoalkan kesahihan penghakiman, atau mempersoalkan jumlah yang dinyatakan yang perlu dibayar dan terhutang kepada pemiutang penghakiman iaitu pempetisyen. Di samping itu, perkara-perkara yang dibangkitkan oleh responden yang menentang petisyen telah dipertimbangkan oleh H kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan dalam membuat keputusan untuk pempetisyen (lihat perenggan 9).

(2) Tiada unsur kepada penentangan responden bahawa jumlah yang terhutang dan perlu dibayar oleh responden di bawah penghakiman adalah salah. Malah, sijil hutang pempetisyen menunjukkan pengiraan I hutang penghakiman tertunggak dan jumlah tertunggak adalah RM1,648,376.96. Jumlahnya sebanyak RM1,648,376.96 adalah amaun yang dinyatakan dalam notis tersebut dan juga petisyen. Oleh itu mahkamah berpuas hati bahawa jumlah tertunggak dan terhutang oleh responden kepada pempetisyen telah dikira dengan betul dan tepat

mengikut syarat penghakiman (lihat perenggan 10).

(3) Mahkamah tidak boleh menerima hujahan responden bahawa pempetisyen mesti mengambil semula barang-barang sewa dan menjualnya dan memotong hasil penjualannya dari jumlah yang belum dijelaskan sebelum membuat tuntutan terhadap responden. Pertama, penghakiman tersebut tidak menetapkan bahawa pempetisyen mesti berbuat demikian. Kedua, pempetisyen berhak untuk menuntut jumlah hutang tertunggak dan perlu dibayar oleh responden di bawah perjanjian sewa beli yang kemudiannya digabungkan ke dalam penghakiman tersebut, walaupun pempetisyen tidak merampas kembali barang-barang sewa (lihat perenggan 11).

(4) Pada keseluruhan keterangan dan hujahan, mahkamah mendapati pempetisyen telah membuat satu kes yang kuat untuk penggulungan responden di bawah s 465(1)(e) Akta, kerana responden jelas tidak dapat membayar hutangnya, dan dengan itu adil dan saksama bahawa responden digulung (lihat perenggan 12).]

Notes

For cases on winding up petition, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1801–1973.

Cases referred to

Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd [2008] 3 MLJ 692; [2008] 4 CLJ 359, CA (refd)

Legislation referred to

Companies Act 2016 ss 465(1)(e), (1)(h), 466

Krinjit Kaur (Munhoe & Mar) for the appellant.
Puthan Perumal (Manjit Singh Sachdev, Mohammad Radzi & Partners) for the respondent.

Vazeer Alam J:

[1] This is a petition by the petitioner to wind up the respondent pursuant to s 465(1)(e) and (h) of the Companies Act 2016.

[2] The petitioner states that as at 31 October 2017, the respondent owed the petitioner a sum of RM1,648,376.96, being the outstanding sum due and owing under a judgment obtained by the petitioner against the respondent vide Kuala Lumpur High Court Suit No WA-22NCC-58–02 of 2016, which was subsequently affirmed by the Court of Appeal on 11 April 2017 vide Appeal No W-02(IM)(NCC)-1779–09 of 2016.

[3] A statutory notice of demand was issued by the petitioner's solicitors, Messrs Manjit Singh Sachdev, Mohammad Radzi & Partners on 13 February 2018 under s 465(1)(e) and (h) of the Companies Act 2016 ('the said notice') requiring the respondent to pay the said sum of RM1,648,376.96 within 21 days from receipt of the said notice.

[4] The said notice was served on the respondent on 31 July 2017 at its registered office address at Suite 610, Block C, Phileo Damansara 1, Off Jalan Damansara, 46350 Petaling Jaya, Selangor, and also at its places of business at Suite 18-25-C, Gurney Tower, 18, Persiaran Gurney, Georgetown, 10250 Pulau Pinang, and Suite F-1-5, Block F, 1st Floor, Unit No 5, Neo Damansara, Jalan PJU8/1, Damansara Perdana, 47820 Petaling Jaya, Selangor. The said Notice dated 31 July 2017 is exhibited in the petition.

[5] The respondent did not challenge or dispute the petitioner's demand as contained in the said notice nor did the respondent make payment of the sum of RM1,648,376.96 to the petitioner within 21 days of service of the said notice.

[6] The failure of the respondent to make payment of the debt claimed in the said notice within the 21 day's notice period gives rise to the statutory presumption of insolvency under s 466 of the Companies Act 2016 that reads:

> (1) A company shall be deemed to be unable to pay its debts if —
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> (a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

The petitioner then proceeded to file this petition under s 456(1)(e) of the Companies Act 2016, which reads:

> (1) The Court may order the winding up if
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> (e) the company is unable to pay its debts;

[7] The petition and all relevant cause papers were served on the respondent. The respondent appeared on the petition through its solicitors, Messrs Perumal Brothers and filed affidavits in opposition to the petition. The respondent contends that the amount of RM1,648,376.96 stated in the said notice is erroneous. The respondent states that the judgment on which the petitioner grounds the said notice arises from a hire purchase agreement entered into

between the petitioner and Breast Wellness (M) Sdn Bhd ('hirer') and a guarantee and indemnity entered into between the plaintiff and respondent, wherein the respondent guaranteed due performance of the hire purchase agreement by the hirer. The respondent contends that calculation of the amount said to be outstanding does not correspond to the terms of the hire purchase agreement and the guarantee and indemnity. Further, the respondent contends that the re-taking of the goods which is the subject matter of the hire purchase agreement is a pre-requisite to a claim against the respondent, and thus argues that the amount claimed as debt due and owing in the said notice is wrong.

[8] Learned counsel for the petitioner submits that the respondent had raised similar arguments in the Kuala Lumpur High Court Suit No WA-22NCC-58–02 of 2016, at first instance, where the judgment was obtained. The High Court, in allowing the petitioner's claim had considered these arguments and rejected them, and sealed judgment for the petitioner. The Court of Appeal had also heard similar arguments and rejected them when affirming the decision of the High Court.

[9] I find that the judgment dated 11 April 2017 is a valid and subsisting judgment, which has not been set aside or stayed. Hence, the petitioner is perfectly entitled to present a winding-up petition based on this judgment. it is not the function this winding up court to go behind the judgment unless the judgment was obtained by fraud or collusion. The Court of Appeal in *Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd* [2008] 3 MLJ 692; [2008] 4 CLJ 359 has made that very clear when it said:

> The court in which the winding up petition is filed should not go behind the judgment unless there is evidence to show that the judgment was obtained by fraud or collusion (see *Banfoong Sydney (JM) Sdn Bhd v MIFC Credit & Leasing Sdn Bhd* [1990] 2 MLJ 120 at p 122 and *Quantum Far East (M) Sdn Bhd* [2004] 7 MLJ 507). Having considered the appeal record in this case we find nothing to show that the judgment was irregularly obtained or that the same was obtained by fraud or collusion.

Likewise, in the present case, there is no evidence showing that the judgment on which the petitioner rests this winding up petition was obtained by fraud or collusion. In the absence of such vitiating circumstances or evidence, it is not for this winding up court to question the validity of the judgment, or question the sum stated therein as due and owing to the judgment creditor, ie the petitioner. I further find that the matters raised by the respondent in opposing this petition has been considered by both the High Court and Court of Appeal in sealing judgment for the petitioner.

[10] I agree with learned counsel for the petitioner that there is no substance

to the respondent's contention that the sum due and payable by the respondent under the judgment is erroneous. In fact, the petitioner's certificate of indebtedness enclosed as exh G in the petitioner's affidavit in reply shows the calculation of the outstanding judgment debt as follows:

Judgment Sum calculated as at 28 October 2015	RM1,210,286.43
Add: Interest on RM1,210,286.43 at the rate of 18%pa from 29 October 2015–31 October 2017	RM438,090.53
Total outstanding	RM1,648,376.96

Now, that sum of RM1,648,376.96 is the amount that is stipulated in the said notice and also the petition. I am satisfied that the outstanding sum due and owing by the respondent to the petitioner has been proper and accurately calculated as per the terms of the judgment of 11 April 2017.

[11] As for the respondent's argument that the petitioner must retake possession of the hired goods and have them sold and deduct the proceeds of the sale thereof from the outstanding sum before making any claims against the respondent, I am unable to accept it for the following reasons. Firstly, the judgment of 11 April 2017 does not stipulate that the petitioner must do so. Secondly, the hire purchase agreement itself states in cl 13.2 that:

> If the Owner shall for any reason whatsoever be unable to resume possession of the Goods, the Owner shall be entitled at its option in lieu of resuming possession of the Goods to recover on demand from the Hirer the balance of the hire instalments which would have been payable by the Hirer to complete the purchase of the Goods if this Agreement had not been terminated less a rebate, if any, given by the Owner at its absolute discretion, for the acceleration of payment computed according to the 'Rule of 78' method.

And further, by cl 2 and 2.3 of the guarantee and indemnity agreements, the respondent had agreed as follows:

> I/We further agree that my liability under this Guarantee and Indemnity shall not in any way be discharged diminished or effected by the invalidity or unenforceability of the Hire Purchase Agreement or by:
>
> 2.3 the impairment of any security taken from the Hirer or the failure to realize or enforce such security.

Hence, contractually, the petitioner is entitled to claim the outstanding sum due and payable by the respondent under the hire purchase agreement, which is now merged into the judgment of 11 April 2017, even when the petitioner does not retake possession of the hired goods.

[12] Having considered the totality of the evidence and arguments of counsel, I find that the petitioner has made out a strong case for the respondent's winding-up under s 456(1)(e) of the Companies Act, as the respondent is clearly unable to pay its debts, and thus it is just and equitable that the respondent be wound up.

[13] Wherefore, I granted order in terms of prayers 10(a), (b), and (c) of the petition and fixed cost of the petition at RM5,000 to be borne by the respondent.

Order in terms of prayers 10(a), (b) and (c) of petition granted with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar